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No. 09-____

In the Supreme Court of the United States

SANDRA MARTINEZ-RODRIGUEZ,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the federal courts of appeals have jurisdiction to review decisions by a single member of the Board of Immigration Appeals that "streamline" appeals rather than designate them for resolution by a full three-member appellate panel?

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PETITION FOR A WRIT OF CERTIORARI

Sandra Leticia Martinez-Rodriguez respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the court of appeals is unreported but available at 313 Fed. Appx. 154 (10th Cir. 2009) and reprinted as Appendix A, Pet. App. 1a–15a. The court of appeals dismissed for want of jurisdiction Ms. Martinez-Rodriguez's petition to review the decision of the Board of Immigration Appeals ("BIA"), which challenged, *inter alia*, a single BIA member's procedural decision to resolve Ms. Martinez-Rodriguez's appeal individually rather than refer the appeal to a three-member panel. The BIA member's short opinion (reprinted as Appendix B, Pet. App. 16a–19a) affirmed the decision of an Immigration Judge ("IJ") dated June 27, 2007 (reprinted as Appendix C, Pet. App. 20a–44a).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Tenth Circuit entered its judgment and opinion on February 20, 2009. Justice Breyer granted petitioner's application to extend the time to file a petition for a writ of certiorari through and including July 20, 2009. Supreme Court Dkt. No. 08A1031. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Administrative Procedures Act Provisions

5 U.S.C. § 701, "Application; definitions," provides, in pertinent part:

> (a) This chapter [5 U.S.C. §§ 701 et seq.] applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 702, "Right of review," provides, in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Immigration and Naturalization Act Provisions

8 U.S.C. § 1229b(b), "Cancellation of removal and adjustment of status for certain nonpermanent residents," provides, in pertinent part:

> (1) In general. The Attorney General may cancel removal of, and adjust to the

status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) [8 U.S.C. §§ 1182(a)(2), 1227(a)(2), or 1227(a)(3)], subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1252(a) provides, in pertinent part:

(1) General orders of removal.

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 235(b)(1) [8 U.S.C. § 1225(b)(1)]) is

governed only by chapter 158 of title 28 of the United States Code [28 U.S.C. §§ 2341 et seq.], except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review.

* * *

(B) Denials of discretionary relief.

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code [28 U.S.C. § 2241], or any other habeas corpus provision, and sections 1361 and 1651 of such title [28 U.S.C. §§ 1361 and 1651], and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245 [8 U.S.C. §§ 1182(h), 1182(i), 1229b, 1229c, or 1255], or

(ii) any other decision or action of the Attorney General or the

> Secretary of Homeland Security the authority for which is specified under this title [8 U.S.C. §§ 1151 et seq.] to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 208(a) [8 U.S.C. § 1158(a)].
>
> * * *
>
> (D) Judicial review of certain legal claims.
>
> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Provisions from the Code of Federal Regulations

8 C.F.R. § 1003.1(e), "Case management system," provides, in pertinent part:

> The Chairman shall establish a case management system to screen all cases and to manage the Board's caseload. Unless a

case meets the standards for assignment to a three-member panel under paragraph (e)(6) of this section, all cases shall be assigned to a single Board member for disposition. The Chairman, under the supervision of the Director, shall be responsible for the success of the case management system. The Chairman shall designate, from time to time, a screening panel comprising a sufficient number of Board members who are authorized, acting alone, to adjudicate appeals as provided in this paragraph.

* * *

(3) Merits review.

In any case that has not been summarily dismissed, the case management system shall arrange for the prompt completion of the record of proceedings and transcript, and the issuance of a briefing schedule. A single Board member assigned under the case management system shall determine the appeal on the merits as provided in paragraph (e)(4) or (e)(5) of this section, unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of paragraph (e)(6) of this section. The Board member may summarily dismiss an appeal after completion of the record of proceeding.

(4) Affirmance without opinion.

(i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

* * *

(5) Other decisions on the merits by single Board member.

If the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or

remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6) of this section under the standards of the case management plan. A single Board member may reverse the decision under review if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation. A motion to reconsider or to reopen a decision that was rendered by a single Board member may be adjudicated by that Board member unless the case is reassigned to a three-member panel as provided under the standards of the case management plan.

(6) Panel decisions.

Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:

(i) The need to settle inconsistencies among the rulings of different immigration judges;

(ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;

(iii) The need to review a decision by an immigration judge or the Service

that is not in conformity with the law or with applicable precedents;

(iv) The need to resolve a case or controversy of major national import;

(v) The need to review a clearly erroneous factual determination by an immigration judge; or

(vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 1003.1(e)(5).

STATEMENT OF THE CASE

1. Petitioner Sandra Leticia Martinez-Rodriguez is a 31-year-old native and citizen of Mexico. Pet. App. 2a, 23a. She entered the United States in 1988, at the age of twelve, and has lived in this country ever since. Pet. App. 2a. She lives with the father of her three young daughters—Jazmine, age 11; Jeanette, age 7; and America, age 4—each of whom is a U.S. citizen by birth. Pet. App. 2a, 21a, 24a. She also remains close to her elderly father, a lawful permanent resident of the United States, *see* Pet. App. 29a, 32a, and several siblings who are U.S. citizens and/or lawful residents, one of whom has effectively served as Ms. Martinez-Rodriguez's

mother throughout the history of their relationship, *see* AR 29–30.[1]

In 2004, the Department of Homeland Security issued a notice charging Ms. Martinez-Rodriguez with being subject to removal from the United States. Pet. App. 2a. In response, Ms. Martinez-Rodriguez admitted her removability but applied for cancellation of removal under 8 U.S.C. § 1229b(b), which authorizes the Attorney General to cancel removal of an alien in certain circumstances. Pet. App. 2a; *see also* 8 U.S.C. § 1229b(b).

Ms. Martinez-Rodriguez's application was reviewed by an Immigration Judge. Through a written decision issued June 27, 2007, the IJ rejected Ms. Martinez-Rodriguez's cancellation request. Pet. App. 20a–44a. The IJ agreed that Ms. Martinez-Rodriguez satisfied three of the statutory requirements for cancellation of removal: she has been present in the United States for a continuous period of not less than ten years, Pet. App. 30a, she has been a person of good moral character during that time, Pet. App. 31a, and she has never been convicted of a relevant criminal offense, Pet. App. 31a–32a. With respect to the final factor, however, the IJ concluded that Ms. Martinez-Rodriguez's relatives would not suffer any "exceptional and extremely unusual hardship" from her removal. Pet. App. 32a–41a; *see also* 8 U.S.C. § 1229b(b)(1)(D). As a result, the IJ found that Ms. Martinez-Rodriguez

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[1] Citations to "AR" refer to the Administrative Record filed before the Tenth Circuit in this case.

was "not eligible for cancellation of removal," and rejected her request. Pet. App. 41a.

2. Ms. Martinez-Rodriguez appealed the IJ's decision to the Board of Immigration Appeals. Prior to 1999, all such appeals were decided by panels of three BIA members. Under "streamlining" regulations promulgated in 1999 and 2002, however, most appeals are now regularly resolved by less than a full BIA panel. Under these regulations, all cases are initially assigned to a single BIA member, who is responsible for determining, under 8 C.F.R. § 1003.1(e)(6), whether the case must be referred to a full three-member panel. *See* 8 C.F.R. § 1003.1(e)(3) ("A single Board member assigned under the case management system shall determine the appeal on the merits . . . unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of paragraph (e)(6) of this section."); *see also* § 1003.1(e)(1) ("Unless a case meets the standards for assignment to a three-member panel . . . all cases shall be assigned to a single Board member for disposition."). Subsection (e)(6), in turn, sets forth a variety of circumstances that require full panel review, including but not limited to the need to settle inconsistencies among the rulings of different IJs, *see* § 1003.1(e)(6)(i); the need to review an IJ decision that is not in conformity with applicable law or precedents, *see* § 1003.1(e)(6)(iii); the need to review an IJ's clearly erroneous factual determination, *see* § 1003.1(e)(6)(v); and, in most circumstances, the need to reverse an IJ's decision, *see* § 1003.1(e)(6)(vi).

In cases where the subsection (e)(6) factors are not met, the single BIA member must dispose of the appeal on his or her own. The regulations provide only two ways to do so. First, in limited circumstances, the BIA member must affirm the decision without opinion. *See* § 1003.1(e)(4). Subsection (e)(4) requires affirmance without opinion whenever the IJ's decision was "correct" and the issues on appeal are "squarely controlled by existing precedent" or "not so substantial" to warrant a written opinion. *See id.* Second, in those cases where affirmance without opinion is not required, the BIA member shall issue a brief order resolving the appeal under Section 1003.1(e)(5). *See also* §§ 1003.1(e)(1), (e)(3). A single BIA member has almost no authority, however, to reverse an IJ's decision. *See* §§ 1003.1(e)(4), (e)(5). Rather, he or she may only reverse in those cases in which doing so is "plainly . . . required by intervening" law, such as a BIA decision, an act of Congress, or a regulation. *See* § 1003.1(e)(5).

Once a single BIA member affirms an IJ's decision to deny cancellation of removal, there is no appeal of the underlying merits of that decision. *See* 8 U.S.C. § 1252(a)(2)(B)(i) (stating that no court has jurisdiction to review any judgment regarding the granting of relief under Section 1229b); *Morales Ventura v. Ashcroft*, 348 F.3d 1259, 1261–1262 (10th Cir. 2003) (stating that cancellation-of-removal hardship determination is an unreviewable discretionary decision under Section 1252(a)(2)(B)(i)). As a practical matter, therefore, the only hope for applicants such as Ms. Martinez-Rodriguez is to

have their cases heard by a three-member BIA panel.

In Ms. Martinez-Rodriguez's case, a single BIA member elected to resolve her appeal through an opinion under subsection (e)(5), *see* Pet. App. 16a–19a, even though she had expressly requested full panel review under subsection (e)(6), *see* AR 25. Ms. Martinez-Rodriguez's appellate briefs argued that full panel review was required under subsection (e)(6) because the IJ had made numerous material factual errors, *see* AR 26–33, the IJ's hardship determination contradicted the relevant BIA precedents, *see* AR 27–38, and there was a need for "useful Board precedent" on what constitutes "exceptional and extremely unusual hardship," *see* AR 25–26. Nevertheless, the single BIA member affirmed the IJ's finding that Ms. Martinez-Rodriguez's qualifying relatives would not suffer hardship warranting cancellation of removal, without any discussion of his decision to resolve the appeal without referral to a full three-member panel. Pet. App. 17a. Ms. Martinez-Rodriguez's motion for reconsideration of the BIA member's decision was similarly rejected. AR 2.

3. Ms. Martinez-Rodriguez petitioned for review to the United States Court of Appeals for the Tenth Circuit, as provided for by 8 U.S.C. § 1252(b). In accordance with 8 U.S.C. § 1252(a)(2)(B), she did not challenge the merits of the BIA member's conclusion that her qualifying relatives would not suffer the requisite hardship were she removed to Mexico. Instead, her petition challenged, on constitutional and statutory grounds, various procedural irregular-

ities in the BIA's review of her appeal, including that the BIA member violated Section 1003.1(e)(6) by refusing to refer her case to a three-member panel.

The Tenth Circuit, in a non-precedential opinion, rejected Ms. Martinez-Rodriguez's petition. With respect to the streamlining issue, the court relied heavily upon its prior precedential decision in *Tsegay v. Ashcroft*, 386 F.3d 1347 (10th Cir 2004), which held that the court had no jurisdiction to review "the decision of a BIA judge to affirm an IJ's decision without opinion under § 1003.1(e)(4), rather than issue a written opinion." Pet. App. 11a. Applying the same logic to the BIA member's refusal to refer the case to a full panel under subsection (e)(6), the court of appeals concluded that it lacked jurisdiction over Ms. Martinez-Rodriguez's legal challenge.

REASONS FOR GRANTING THE PETITION

The first responsibility of a BIA member in every appeal is to determine whether the case must be referred to a full three-member panel for resolution, as provided by 8 C.F.R. § 1003.1(e)(6). In dismissing Ms. Martinez-Rodriguez's petition for review, the Tenth Circuit has deepened an entrenched circuit split about whether this threshold determination is subject to review in the federal courts of appeals. Like the decision below, decisions out of the Second and Eighth Circuits hold that the courts of appeals are without jurisdiction to review a BIA member's refusal to refer a case to a three-member panel under subsection (e)(6). In direct conflict with those decisions, the Third and Fourth Circuits have held that the courts of appeals have jurisdiction to review such (e)(6) decisions. The Tenth Circuit's decision both widens the conflict on this precise issue and demonstrates the need for this Court's review.

The availability of judicial review of a BIA member's refusal to refer a case to a full panel is of critical importance to participants in the immigration appeals process, many of whom have no other safeguard to ensure that the BIA's focus on swift resolution does not unfairly deny them their only hope of victory. The question is equally important to the federal courts of appeals themselves, which are buried under the avalanche of appeals that the BIA's streamlining regulations have caused. Finally, the decision below is simply wrong on the merits, contradicting both statutory text and this Court's precedents concerning the scope of judicial review available over agency decision-

making. This Court should therefore grant the petition, issue a writ of certiorari to the Tenth Circuit, and reverse the decision below.

I. The Decision Below Deepens a Mature Split Among the Circuits Regarding the Availability of Judicial Review Over a BIA Member's Refusal to Refer a Case to a Full Three-Member Panel.

The jurisdictional issue that has divided the circuits turns on the requirements of the Administrative Procedure Act ("APA"). The APA broadly provides for judicial review of agency action. *See* 5 U.S.C. §§ 702, 706. Indeed, this Court has read the APA as "embodying a 'basic presumption of judicial review.'" *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)). Nonetheless, the APA includes a narrow exception forbidding review of decisions "committed to agency discretion by law." *See* 5 U.S.C. § 701(a)(2). As this Court explained, "'review is not to be had' in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *See Lincoln*, 508 U.S. at 191 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

Applying these standards to a single BIA member's refusal to refer a case to a three-member panel under 8 C.F.R. § 1003.1(e)(6), the courts of appeals have divided over a simple question: is a determination under subsection (e)(6) one of those "rare" decisions "committed to agency discretion by

law?" Both the Third and Fourth Circuits have held that it is not and, therefore, have exercised appellate jurisdiction in cases like the present one. Others, however, have disagreed—creating an indisputable split that only this Court can resolve.

A. The Third and Fourth Circuits Have Expressly Found Jurisdiction to Review Refusals to Refer an Appeal to a Panel Under Subsection (e)(6).

In direct conflict with the decision below, the Third and Fourth Circuits have held that the courts of appeals have jurisdiction to review a BIA member's decision not to refer an appeal for full panel review.

In *Purveegiin v. Gonzales*, 448 F.3d 684, 685 (3d Cir. 2006), the Third Circuit explored the question of appellate jurisdiction in detail and concluded that jurisdiction exists. Applying the APA's instruction that agency determinations are reviewable unless the relevant action is "committed to agency discretion by law," *see* 5 U.S.C. § 701(a)(2), the Third Circuit determined that "a Board member's discretion to decide a case without panel review is informed and constrained by 8 C.F.R. § 1003.1(e)(5) and (e)(6)." *See* 448 F.3d at 690. Although the court acknowledged that subsection (e)(6)'s language, read in isolation, could be interpreted to give a single BIA member absolute discretion over whether to refer a case to a three-member panel, *see id.* at 689, the court concluded that subsections (e)(5) and (e)(6), when interpreted in tandem, made referral mandatory in any case satisfying subsection (e)(6)'s

requirements, *see id.* at 689–690. Such a view was further supported by the history of 8 C.F.R. § 1003.1's adoption, which made clear that the subsection (e)(6) factors were mandatory. *See id.* at 690. Finally, the court recognized the important procedural benefits full-panel review affords to individuals involved in immigration proceedings, a factor that this Court has held justifies judicial review of agency decisionmaking. *See id.* at 690–691 (citing *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538–539 (1970)). As a result, even though the Third Circuit recognized that the Eighth Circuit had reached the opposite conclusion, it found jurisdiction to review a single BIA member's procedural decision to streamline a case. *See id.* at 691–692 (declining to follow *Bropleh* and *Ngure*, discussed *infra*).

The Fourth Circuit followed suit in *Quinteros-Mendoza v. Holder*, 556 F.3d 159 (4th Cir. 2009), which also found jurisdiction supporting judicial review of streamlining decisions under subsections (e)(5) and (e)(6). Recognizing "the division in the circuits on this question," the court of appeals considered the question in detail and sided with the Third Circuit's approach. *See* 556 F.3d at 162–163. Like the *Purveegiin* court, the Fourth Circuit rooted its finding of jurisdiction upon a close study of the language and structure of 8 C.F.R. § 1003.1(e), coupled with this Court's more general guidance regarding the "strong presumption favoring judicial review of agency action" and the narrow nature of the "committed to agency discretion" exception thereto. *See id.* Again as in *Purveegiin*, the *Quinteros-Mendoza* court expressly rejected the

contrary holdings of other circuits. *See id.* at 162, 163 n.4.

B. Three Circuits Have Concluded That Subsection (e)(6) Determinations Are Not Susceptible to Judicial Review.

In contrast, the Second, the Eighth, and now the Tenth Circuits have concluded that the courts of appeals lack jurisdiction to review a BIA member's refusal to refer a case to a three-member panel.

The decision below cements the Tenth Circuit's place on this issue, placing it in direct conflict with the decisions finding jurisdiction discussed above. In a prior decision, *Batalova v. Ashcroft*, 355 F.3d 1246 (10th Cir. 2004), the Tenth Circuit had seemingly recognized that subsection (e)(6) determinations could indeed be challenged before the courts of appeals. *See* 355 F.3d at 1252–1253. Yet the decision below instead followed the court's opinion in *Tsegay v. Ashcroft*, 386 F.3d 1347 (10th Cir. 2004), which recognized the circuit split governing the jurisdictional question but concluded that streamlining decisions were "committed to agency discretion by law." *See* 386 F.3d at 1355–1356; *see also* Pet. App. 10a–13a. The *Tsegay* court reached this holding based on its conclusion that the streamlining regulations were designed primarily to assist the BIA in carrying out its administrative duties, and that judicial review over streamlining decisions would be unworkable in any case. *See* 386 F.3d at 1355–1356.

The Eighth Circuit has also held that it is without jurisdiction to review a BIA member's refusal to refer a case to a three-member panel under subsection (e)(6). In *Bropleh v. Gonzales*, 428 F.3d 772, 779 (8th Cir. 2005), for instance, the court held that it lacked jurisdiction to review a claim that "the Board of Immigration Appeals erred in its decision not to refer Bropleh's appeal to a three-member panel." In reaching this decision, the court relied on its earlier decision in *Ngure v. Ashcroft*, 367 F.3d 975 (8th Cir. 2004), a case that considered the reviewability of streamlining decisions in detail and rejected jurisdiction over them for several reasons. In doing so, the *Ngure* court disagreed with nearly every conclusion later reached by the Third Circuit in *Purveegiin*—holding that subsection (e)(6)'s factors governing full-panel review were not mandatory, *see* 367 F.3d at 986–987, that the streamlining regulations did not provide immigrant applicants with any "important procedural benefits," *see id.* at 984–985, and that streamlining decisions were never intended to be susceptible to judicial review, *see id.*

Finally, the Second Circuit reached the same conclusion in *Kambolli v. Gonzales*, 449 F.3d 454 (2d Cir. 2006). After noting that the circuits were divided "on the question of whether Courts of Appeals are vested with jurisdiction to review the Board's decision to have a particular case decided by a single member rather than by a three-member BIA panel," 449 F.3d at 459–460, the court concluded that "the language of subsection (e)(6) allowing reference to three-member BIA panels in certain circumstances does not provide a meaningful stand-

ard for judicial review," *id.* at 461 & n.11. Thus, the Second Circuit concluded that that it lacked jurisdiction to review decisions by a single BIA member to affirm IJ decisions "without reference to a three-member BIA panel—substantially for the reasons articulated by our sister circuits reaching the same result." *See id.* at 463 (citing *Ngure* and *Tsegay*).

C. The Circuit Split Is Well Entrenched and Widely Acknowledged.

In spite of the widespread disagreement among the circuits on this issue, consensus remains on one point—this circuit split is well recognized and firmly entrenched. Nearly every major decision addressing the subject has acknowledged that the circuits are divided. *See, e.g.*, *Kambolli*, 449 F.3d at 459–460, 463 (noting split, following *Ngure* and *Tsegay*); *Purveegiin*, 448 F.3d at 691–692 (noting split, rejecting *Ngure*); *Quinteros-Mendoza*, 556 F.3d at 162–164 (noting split, following *Purveegiin*); *Ngure*, 367 F.3d at 988 (noting split); *Tsegay*, 386 F.3d at 1354. The existence of the split is further confirmed by courts that have purported to avoid entering the debate. *See, e.g.*, *Hassan v. Gonzales*, 403 F.3d 429, 437 (6th Cir. 2005) (noting split); *Kacaj v. Gonzales*, 132 Fed. Appx. 584 (6th Cir. 2005) ("Several courts of appeals have arrived at different conclusions on [the streamlining] issue[.]").

Indeed, the Executive Office for Immigration Review (EOIR) has, in a now-abandoned proposed rulemaking, already acknowledged the division among the circuits regarding appellate jurisdiction

to review streamlining decisions. *See* Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,657 (June 18, 2008) (discussing split). Though the EOIR cleared a final version of an amendment to 8 C.F.R. § 1003.1(e) that would have purported to restrict appellate review of streamlining decisions, the Department of Justice withdrew the proposed rule in December 2008. *See* American Immigration Law Foundation, Litigation Clearinghouse Newsletter (Jan. 9, 2009).[2]

It is therefore hard to dispute that the circuits remain legitimately divided on the question presented by this petition.

II. Resolution of this Case Will Provide Guidance on a Circuit Split Regarding Jurisdiction to Review Decisions to Affirm Without Opinion Under Subsection (e)(4).

1. By reviewing this case, this Court will do far more than resolve the current split regarding review of decisions under subsection (e)(6). It will also provide guidance on a related split on whether the courts of appeals have jurisdiction to review a BIA member's decision to affirm without opinion under 8 C.F.R. § 1003.1(e)(4). To date, some courts hold that the courts of appeals have jurisdiction to review a single BIA member's decision to affirm without opinion under subsection (e)(4), while others take the

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[2] *Available at* http://www.aila.org/content/default aspx?docid=27583.

opposite view. This split is significantly related to—and in many cases intertwined with—the split that has emerged about the reviewability of decisions under subsection (e)(6).

For instance, every decision by a BIA member to affirm without opinion *necessarily* includes within it a decision under subsection (e)(6) to keep the case, rather than refer it to a three-member panel. Whether a single member subsequently affirms without opinion under subsection (e)(4) or writes a short opinion under subsection (e)(5), therefore, makes little difference. As long as the petitioner argues that the BIA member erred when he refused to refer the case for full panel review, it makes no difference to the jurisdictional inquiry whether the BIA member issued a short opinion or instead affirmed without opinion. In both cases, the BIA member had to *first* decide to keep the case.

Many of the courts of appeals involved in the subsection (e)(6) split discussed above recognize the relationship between that split and the one that has emerged around subsection (e)(4). For instance, the Second Circuit in *Kambolli* explained that "[i]n nearly all cases of unilateral decisions without opinion [under subsection (e)(4)], the BIA member's review of the merits of the underlying IJ decision will merge with his choice to dispose of the case without reference to a three-member panel." *Kambolli*, 449 F.3d at 462 n.12. Given this overlap, it is not surprising that cases evaluating review of affirmances without opinion under subsection (e)(4) have relied upon subsection (e)(6) precedent, and vice versa. *See, e.g.*, Pet. App. 10a–15a (relying upon

Tsegay, a subsection (e)(4) case, to determine jurisdiction over Ms. Martinez-Rodriguez's challenge to a BIA member's refusal to refer her case to a three-member panel under (e)(6)); *Purveegiin*, 448 F.3d at 684 (citing *Smriko v. Ashcroft*, 387 F.3d 279 (3d Cir. 2004), a subsection (e)(4) case, and explaining that both subsections (e)(4) and (e)(6) "impose affirmative limits on a single member's authority to resolve an appeal without panel participation").

This Court's decision regarding the split under subsection (e)(6) will not resolve all cases arising under subsection (e)(4). Nonetheless, it will provide significant guidance to the lower courts and to litigants about the reviewability of a vast majority of the cases that implicate those provisions—those cases where the appeal specifically challenges the BIA member's refusal to refer a case for full-panel review.

2. Like the split about the reviewability of decisions under subsection (e)(6), the split under subsection (e)(4) is a very real one as well. The First, Third, Fourth, and Ninth Circuits have expressly found jurisdiction to review decisions to affirm without opinion under subsection (e)(4). For example, in *Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003), the First Circuit rejected the argument that affirmance-without-opinion decisions were committed to agency discretion by law, finding that Section 1003.1(e) "provides more than enough 'law' by which a court could review" a BIA member's streamlining decision. *See* 350 F.3d at 206. In *Chen v. Ashcroft*, 378 F.3d 1081 (9th Cir. 2004), the Ninth Circuit reached the same conclusion with respect to

subsection (e)(4)'s regulatory precursor, concluding that application of the regulation "is clearly non-discretionary." 378 F.3d at 1088. These courts thus accord with the Third and Fourth Circuits, both of which have upheld jurisdiction in affirmance-without-opinion challenges. *See Smriko*, 387 F.3d 279 (reviewing decision under subsection (e)(4)); *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272 (4th Cir. 2004) (same).

Though the Fifth and Sixth Circuits claim to have left the question open, both have implicitly found jurisdiction to review BIA member decisions to affirm without opinion. In *Zhu v. Ashcroft*, 382 F.3d 521 (5th Cir. 2004), the Fifth Circuit recognized that it had found jurisdiction to review a BIA member's decision to affirm without opinion pursuant to subsection (e)(4) in several persuasive yet non-precedential decisions, but had not yet had the occasion to decide the issue in a published case. *See* 382 F.3d at 526–527 (citing *Dika v. Ashcroft*, 85 Fed. Appx. 374 (5th Cir. 2004); *Turribiartes-Vitales v. Ashcroft*, 75 Fed. Appx. 312 (5th Cir. 2004); *Patel v. Ashcroft*, 71 Fed. Appx. 306 (5th Cir. 2003). Similarly, the Sixth Circuit has endorsed jurisdiction to review subsection (e)(6) determinations but then tried to avoid the issue by "assuming without deciding" that such jurisdiction exists. *See Denko v. INS*, 351 F.3d 717, 731–732 (6th Cir. 2003); *see also Hassan*, 403 F.3d at 437–438 (noting circuit split; citing *Denko*). But courts of appeals may not "assume" jurisdiction exists in order to review the merits of a case. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2006) (quoting *Ex parte McCardle*, 74 U.S. 506 (1869),

"'Without jurisdiction the court cannot proceed at all in any cause'; it may not assume jurisdiction for the purpose of deciding the merits of the case."). Therefore, the Sixth Circuit's repeated review of streamlining decisions places it in agreement with those other circuits that have expressly found jurisdiction over such petitions. *See Hassan*, 403 F.3d at 437.

In contrast to these decisions, the Second, Eighth, and Tenth Circuits have held that they lack jurisdiction to review a single member's decision to affirm without opinion under subsection (e)(4). *See Kambolli*, 449 F.3d at 454 (collapsing the inquiry under subsections (e)(4) and (e)(6), but holding that there was no jurisdiction to review a decision to affirm without opinion under subsection (e)(4)); *Ngure*, 367 F.3d at 975 (holding that there was no jurisdiction to review a decision to affirm without opinion under subsection (e)(4)); *Tsegay*, 386 F.3d at 1347 (same).

Thus, the courts of appeals remain bitterly divided over two related issues regarding the interpretation of 8 C.F.R. § 1003.1(e)'s streamlining provisions—both the reviewability of refusals to refer cases to three-member panels as required by subsection (e)(6) and the reviewability of decisions to affirm without opinion under subsection (e)(4). While the two issues are analytically distinct, they overlap in substantial respects. Resolution of the split under subsection (e)(6) in this case will certainly provide guidance to the lower courts on the split that has arisen under subsection (e)(4).

III. Judicial Review of BIA Streamlining Determinations Presents Several Issues of National Importance That Require This Court's Review.

The question of whether federal courts of appeals may review BIA streamlining decisions is of critical importance—both to persons involved in immigration decisions and to the courts of appeals themselves. As a result, this Court's intervention is necessary to finally resolve this longstanding dispute.

1. First, judicial review of streamlining decisions provides a much-needed check upon the administration of the BIA appeals system as a whole. Absent such review, improper streamlining determinations will continue to undermine the quality and accuracy of BIA decisionmaking, with tangible prejudice to the rights of applicants in the immigration process.

When the streamlining process was first adopted in 1999, it was justified based on an "enormous and unprecedented increase in the caseload of the [BIA]." *See* Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999). The number of annual appeals from IJ decisions had outpaced the BIA's capacity to render decisions, creating a substantial backlog of cases. *Id.* As a result, streamlining was proposed as a means to allegedly achieve four goals: (1) promoting uniformity in IJ decisions, (2) deciding cases in a more "timely and fair manner," (3) assuring the correct dispositions of

individual cases, and (4) eliminating the BIA's backlog. *Id.* at 56,136.

Yet the single-member review system created to achieve these goals actually *constrains* the ability of the BIA to afford relief in any given appeal. Under the modern streamlining regulations, single BIA members are given broad authority to deny appeals, but are authorized to reverse IJ decisions only "if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation." 8 C.F.R. § 1003.1(e)(5). Although single members may reverse on the grounds that the law changed since the IJ ruled, they can never reverse when an IJ erred in applying existing law. *See, e.g., Purveegiin*, 448 F.3d at 692 (stating that "permission to 'reverse' a decision of an immigration judge" is "[n]otably absent" from subsection (e)(5)). Thus, any BIA appeal must survive the streamlining process if an applicant can hope to prevail.

The streamlining regulations have thus had a substantive effect upon BIA decisionmaking. Independent audits contracted by the EOIR and the ABA demonstrate that streamlining has allowed the BIA to process appeals far more quickly than before. *See* Dorsey & Whitney LLP, Board of Immigrant Appeals: Procedural Reforms to Improve Case Management ("Dorsey Report"), at 18 (July 22, 2003) (unpublished study, submitted to the American Bar Association Commission on Immigration Policy,

Practice and Pro Bono)[3] (discussing "immediate effect" of streamlining rules on BIA backlog); Arthur Andersen & Co., Board of Immigration Appeals (BIA) Streamlining Pilot Assessment Report ("Andersen Report"), at 5 (2001) (study conducted on behalf of EOIR)[4] (streamlining "directly contributed to a 53% increase in the overall number of BIA cases completed during its implementation period"). Yet although the BIA reviews an ever-increasing amount of appeals—thousands per month—the amount of *reversals* it grants has stayed surprisingly constant. *See* Dorsey Report at 40.

If streamlining had no substantive effect on BIA decisionmaking, one would expect the ratio of affirmed to reversed appeals to remain at least *close* to the pre-streamlining figures. It cannot be that the BIA's backlog included only meritless appeals. Instead, streamlining has had a significant effect upon the resolution of BIA appeals. *See* Dorsey Report at 40 ("Before the spring of 2002, approximately one in four appeals was granted; since then, approximately one in ten appeals is granted."); *id.* at 7 (streamlining regulations make substantive mistakes "more likely to happen and more difficult to detect"). With single-member review the regulatory norm, it is substantively harder for an applicant to prevail in an otherwise-deserving appeal.

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[3] *Available at* http://www.dorsey.com/files/upload/DorseyStudyAba_8mgPDF.pdf.

[4] *Available at* http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf, as Appendix 21 to the Dorsey Report.

Streamlining's effects are particularly troubling in cases such as Ms. Martinez-Rodriguez's, where the underlying substantive issues are not subject to federal appellate review. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(B). In cases where the merits of a BIA's decision are later subject to such review, any streamlining errors may be rendered harmless—the court of appeals will be free to review the substance of the case regardless of what procedure the BIA follows. *See, e.g.*, *Batalova*, 355 F.3d at 1253 (noting that "it ma[de] little difference . . . whether the BIA acted through a single member or a three-member panel" in a case where court could "directly review the IJ's decision, which the BIA member adopted"). But when such substantive review is unavailable, the BIA's procedural compliance with the streamlining regulations is the applicants' only source of reassurance that their appeals have received fair consideration.

In such cases, whether the courts of appeals can review the correctness of BIA streamlining decisions is of critical importance. When a single BIA member errs when applying 8 C.F.R. § 1003.1(e)'s standards, then otherwise-meritorious appeals fail to reach the only BIA panels capable of affording relief. The promise of BIA review is thus rendered toothless if victims of erroneous IJ decisions have no way to ensure that their meritorious appeals are referred to a BIA panel capable of affording them the relief they deserve.

2. Furthermore, the advent of the streamlining process has served to overwhelm the federal courts of appeals. In part due to the lack of clarity

regarding the appropriate scope of judicial review of immigration decisions, petitions to review BIA decisions have become a skyrocketing part of the federal appellate docket. Resolution of the question presented, regardless of this Court's answer, would have the valuable effect of reducing this strain.

The statistics in this area speak for themselves: "The increased quantity of BIA decisions, and the dissatisfaction of aliens and their counsel with unexpected affirmances, have created a surge of appeals from the BIA to the federal courts of appeals." Dorsey Report at 40. In 1999, appeals from INS decisions constituted less than 2,000 of the over 54,000 appeals commenced throughout the federal courts of appeals. Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts – 1999 Annual Report of the Director*, Table B-3 at 96 (1999).[5] Yet by 2003, after the adoption of the more stringent streamlining regulations now in effect, "BIA decisions were being appealed to the federal circuit courts at a rate of over 800–900 per month." Dorsey Report at 40. Last year, over 10,000 BIA decisions were challenged in the courts of appeals, with BIA appeals constituting over one-sixth of the *total* workload of the appellate courts. Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts – 2008 Annual Report of the Director*, Table B-3 at 96 (2008).[6] This steady increase reflects both appli-

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[5] *Available at* http://www.uscourts.gov/judbus1999/b03sep99.pdf.

[6] *Available at* http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf.

cants' concerns regarding the substance of BIA decisions and the widespread uncertainty regarding the limits of judicial review.

3. Finally, there is little hope that the question presented will be resolved absent this Court's intervention. The conflict among the circuits on this point is well entrenched, with the circuits aware of their conflicting views yet remaining divided. *See* Part I.C, *supra* (collecting cases).

Nor is it likely that the executive branch will resolve the dispute. As noted above, in June 2008 the EOIR initiated a rulemaking specifically targeting the question of judicial review of streamlining decisions, through a proposed rule purporting to expressly establish the BIA's intent that such determinations be unreviewable. *See* 73 Fed. Reg. 34,654 (June 18, 2008). Such efforts were abandoned in December 2008. *See* American Immigration Law Foundation, Litigation Clearinghouse Newsletter (Jan. 9, 2009). But even such a rule would not eliminate the disagreement among the circuits. Several courts of appeals have held that determinations under the current streamlining factors are susceptible to judicial review regardless of the BIA's intent. *See, e.g.*, *Purveegiin*, 448 F.3d at 690. Others have gone even further, holding that the EOIR does not possess the statutory authority to adopt an unreviewable streamlining regime. *See, e.g.*, *Afanwi v. Mukasey*, 526 F.3d 788, 796 (4th Cir. 2008).

Thus, only this Court can put an end to the longstanding division regarding judicial review of

BIA streamlining determinations. Given that the streamlining system has been shrouded in uncertainty since its adoption, the Court should finally take the opportunity to provide some much-needed clarity.

IV. Under the Relevant Statutes and This Court's Precedents, Streamlining Decisions Are Properly Subject to Judicial Review.

By concluding that a BIA member's refusal to refer a case to a full three-member panel is unreviewable, the Tenth Circuit contradicted this Court's instructions regarding the scope of judicial review under the APA. Properly construed, 8 C.F.R. § 1003.1(e)(6) creates judicially enforceable standards that constrain the decisionmaking of BIA members.

Any question of judicial review of streamlining decisions must begin with this Court's "strong presumption that Congress intends judicial review of administrative action." *See Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). The APA codifies that presumption through 5 U.S.C. § 701(a), which provides that Congress can only preclude judicial review of final agency action through two limited ways: by adopting an express jurisdiction-stripping provision, *see* 5 U.S.C. § 701(a)(1), or by committing agency action "to agency discretion by law," *see id.* at § 701(a)(2). *See also Quinteros-Mendoza*, 556 F.3d at 162.

Here, no statute purports to eliminate judicial review of streamlining decisions. *See Quinteros-Mendoza*, 556 F.3d at 162; *Purveegiin*, 448 F.3d at 688–689. Though the Secretary of Homeland Security is broadly empowered to adopt regulations governing the administration of immigration laws, *see* 8 U.S.C. § 1103(a)(3), nothing in this blanket grant of authority suggests that the administration of those regulations is inherently unreviewable. Rather, this Court has regularly distinguished between review over an agency's power to *promulgate* regulations, which is strictly limited, and review of an agency's adherence to such regulations, which is more broadly available. *Compare Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523–525 (1978), *with Morton v. Ruiz*, 415 U.S. 199, 235–236 (1974), *and Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538–539 (1970); *see also* 33 Charles H. Koch, Jr., *Federal Practice & Procedure* § 8392 at 384–385 n.3 (2006). Furthermore, though certain discretionary immigration-related decisions are expressly made unreviewable by the Immigration and Naturalization Act, *see e.g.*, 8 U.S.C. § 1252(a)(2)(B), the act expressly provides for judicial review of questions of law arising out of cancellation of removal proceedings such as Ms. Martinez-Rodriguez's, *see* 8 U.S.C. § 1252(a)(2)(D). As a result, the EOIR lacks any authority to promulgate regulations purporting to restrict this statutorily granted jurisdiction. *See, e.g.*, *Afanwi*, 526 F.3d at 796.

Debate over the reviewability of streamlining decisions has therefore turned on whether such decisions are "committed to agency discretion by

law" under 5 U.S.C. § 701(a)(2). As this Court has stressed, the "committed to discretion" exception is very narrow, applicable only "in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln*, 508 U.S. at 191 (quoting *Heckler*, 470 U.S. at 830). But here, no *statute* purports to commit streamlining decisions to agency discretion by law, or to establish standards unsusceptible to judicial review. *See, e.g.*, *Quinteros-Mendoza*, 556 F.3d at 162. Rather, decisions rejecting judicial review have relied on the tautological conclusion that the streamlining regulation itself, 8 C.F.R. § 1003.1(e), provides the BIA with the claimed "unreviewable" discretion.

Such a claim does not withstand scrutiny. Although subsection (e)(6) does provide that a BIA member "may only" refer an appeal to a full panel upon a finding that one of the factors is present—language arguably suggesting that the decision of whether or not to do so is discretionary, *see Purveegiin*, 448 F.3d at 689—use of the word "may" does not establish *unreviewable* discretion. *See Zadvydas v. Davis*, 533 U.S. 678, 697 (2001) ("[W]hile 'may' suggests discretion, it does not necessarily suggest unlimited discretion."). Rather, when reviewed in tandem, subsections (e)(5) and (e)(6) establish that referral to a full three-member panel is mandatory whenever a subsection (e)(6) factor is present: "By directing that a single member 'shall' resolve a case 'unless' it falls within the categories of paragraph (e)(6), [subsection (e)(5)] necessarily implies that a single member 'shall not' resolve a case if it does fall within one of those

categories." *Purveegiin*, 448 F.3d at 689. As a result, 8 C.F.R. § 1003.1(e) creates a mandatory rule, not a permissive standard.

Nor are subsection (e)(6)'s factors so malleable as to offer "no meaningful standard against which to judge the agency's exercise of discretion"—*Heckler*'s high standard for withholding judicial review. Rather, Section 1003.1(e) "provides more than enough 'law' by which a court could review" a BIA member's streamlining decision. *See Haoud*, 350 F.3d at 206; *cf. C.C. Distributors, Inc. v. United States*, 883 F.2d 146, 154 (D.C. Cir. 1989) ("Notwithstanding the lack of judicially manageable standards in the underlying statute, regulations promulgated by an administrative agency in carrying out its statutory mandate can provide standards for judicial review of agency action."). Indeed, many of subsection (e)(6)'s factors are determinations regularly made by courts of appeals in countless other contexts, such as judging a decision's "conformity with the law," *see* 8 C.F.R. § 1003.1(e)(6)(iii), or reviewing the presence or absence of "clearly erroneous factual determination[s]," *see id.* at § 1003.1(e)(6)(v). As a result, there is no reason that courts of appeals could not engage in meaningful review of streamlining decisions.

Judicial review is further warranted in light of the procedural benefits that full-panel review affords immigration petitioners. *See, e.g., Am. Farm Lines*, 397 U.S. at 538–539 (judicial review of agency compliance with internal rules warranted when rules "confer important procedural benefits upon individuals in the face of otherwise unfettered

discretion"). As EOIR acknowledged when promulgating the streamlining regulations, full-panel review aids participants in the immigration process by affording them more detailed consideration of their cases. *See, e.g.*, Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,887–54,888 (Aug. 26, 2002). Furthermore, as discussed above, full-panel review presents the *only* method through which the overwhelming majority of applicants can hope to prevail on an appeal of an adverse IJ decision.

Finally, review of streamlining decisions in denial-of-cancellation cases, such as Ms. Martinez-Rodriguez's, would not constitute an end-run around the statutory unreviewability of the BIA member's underlying cancellation decision, as the Tenth Circuit incorrectly maintained. *See* Pet. App. 4a–5a, 14a–15a (rejecting jurisdiction over review of streamlining decision based on lack of jurisdiction over 8 U.S.C. § 1229b(b) hardship determination). Even though certain of the subsection (e)(6) factors share some common ground with the underlying merits of such hardship determinations, many of them do not. *See, e.g.*, 8 C.F.R. §§ 1003.1(e)(6)(i), (ii), (iv). In addition, allowing courts of appeals to review the subsection (e)(6) factors and to remand cases that were improperly streamlined to the BIA for full-panel review does not disturb the BIA's final and unreviewable authority over the substance of a hardship determination.

Thus, under this Court's precedents and the controlling statutory provisions, the federal courts of appeals retain appellate jurisdiction to review BIA

streamlining decisions. The Tenth Circuit's contrary decision is in error and should be reversed.

CONCLUSION

For the reasons provided above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 20, 2009

APPENDIX

APPENDIX A

SANDRA LETICIA MARTINEZ-RODRIGUEZ,
Petitioner,

v.

ERIC H. HOLDER, JR.,*
United States Attorney General, Respondent.

No. 08-9533

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

313 Fed. Appx. 154; 2009 U.S. App. LEXIS 3432

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For MICHAEL B. MUKASEY, United States Attorney General, Respondent: DOH/EOIR/BIA, Attn: Certification Unit, Falls Church, VA; General Counsel, Julie M. Iversen, Office of Immigration Litigation Civil Division, US Department of Justice, Washington, DC; John Longshore, Director, United States Immigration & Custom Enforcement, Denver,

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* Pursuant to Fed. R. App. P. 43(c)(2), Eric H. Holder, Jr. is substituted for Michael B. Mukasey as the respondent in this appeal

CO; Ann Welhaf, U.S. Dept. of Justice/Civil Division-OIL, Washington, DC.

JUDGES: Before MURPHY, McKAY, and ANDERSON, Circuit Judges.

OPINION BY: Stephen H. Anderson

OPINION

ORDER AND JUDGMENT**

Sandra Leticia Martinez-Rodriguez, a native and citizen of Mexico, entered this country illegally in 1988 when she was twelve years old. She now has three daughters who are United States citizens. In 2004, the Department of Homeland Security issued a notice to appear charging Ms. Martinez-Rodriguez with being subject to removal. Ms. Martinez-Rodriguez admitted removability but applied for cancellation of removal under 8 U.S.C. § 1229b(b).[1]

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Under 8 U.S.C. § 1229b(b):

(1) In general

After an Immigration Judge (IJ) denied her application, she appealed to the Board of Immigration Appeals (BIA). A single member of the BIA affirmed the IJ's decision with a short opinion under 8 C.F.R. § 1003.1(e)(5). The BIA member agreed that, [f]or the reasons identified by the [IJ]," Ms. Martinez-Rodriguez did not qualify for cancellation of removal because, while her "removal would adversely affect her family, the level of hardship f[ell] short of the exceptional and extremely unusual standard set forth in section

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The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien --

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen [**4] of the United States or an alien lawfully admitted for permanent residence.

[1229b(b)(1)(D)]." Admin. R., Vol. 1 at 18. The BIA also denied her motion to reconsider. Ms. Martinez-Rodriguez has petitioned this court for review of the BIA's decisions, raising three points of error: (1) that the BIA denied her due process by adopting "[m]aterial and [e]rroneous [f]actual [f]indings" made by the IJ, Pet'r Opening Br. at 20 (emphasis omitted); (2) that the BIA denied her due process because neither the IJ's nor the BIA's decisions showed that BIA precedent had been properly applied, and (3) that the BIA denied her due process and failed to follow the applicable regulation because the member assigned to the case did not forward her appeal to a three-member panel for review.

I

Because the BIA member assigned to the case issued a brief order under § 1003.1(e)(5), we review that independent decision, which constitutes the final order of removal. *See Uanreroro v. Gonzales*, 443 F.3d 1197, 1204 (10th Cir. 2006). But when, as in this case, the BIA member specifically adopts the IJ's reasoning in his decision, see Admin. R., Vol. 1 at 18, we may also look to the IJ's decision, *Uanreroro*, 443 F.3d at 1204.

Generally, when reviewing a decision from the BIA "we consider any legal questions de novo, and we review the agency's findings of fact under the substantial evidence standard. Under that test, our duty is to guarantee that factual determinations are supported by reasonable, substantial and probative evidence considering the record as a whole." *Diallo v. Gonzales*, 447 F.3d 1274, 1279 (10th Cir. 2006)

(alteration and quotation omitted). But, even after the passage of the REAL ID Act of 2005, "challenges directed solely at the agency's discretionary and factual determinations remain outside the scope of judicial review." *Id.* at 1281. This includes challenges to the discretionary determination of whether an alien showed the requisite "exceptional and extremely unusual hardship" for cancellation of removal under § 1229b(b)(1)(D). *See* 8 U.S.C. § 1252(a)(2)(B)(i); *Morales Ventura v. Ashcroft*, 348 F.3d 1259, 1261-62 (10th Cir. 2003).

A

Nevertheless, Ms. Martinez-Rodriguez claims she is not appealing the BIA's decision that she failed to show the requisite "exceptional and extremely unusual hardship." Instead she claims that she is appealing the agency's failure to provide her due process in reaching that decision. *See Diallo*, 447 F.3d at 1280 ("The Fifth Amendment entitles aliens to due process of law in removal proceedings."). She claims the BIA failed to provide her due process because it relied on the IJ's decision which, in turn, relied on erroneous factual findings and failed to properly follow BIA precedent in denying her application for cancellation of removal.

We turn first to Ms. Martinez-Rodriguez's claim that she was denied due process because the BIA relied on material and erroneous factual findings. Although it is true that following enactment of the REAL ID Act, we have jurisdiction to review constitutional claims and questions of law raised in a petition for review, 8 U.S.C. § 1252(a)(2)(D), Ms.

Martinez-Rodriguez has done nothing to tie her naked factual challenges to the Due Process Clause other than use the words "due process." She simply points to the factual findings she disagrees with and then claims a due process violation occurred. As noted above, challenges directed solely at an agency's factual determinations are outside our jurisdiction. *Diallo*, 447 F.3d at 1281. Simply "[r]ecasting challenges to factual or discretionary determinations as due process or other constitutional claims is clearly insufficient to give this Court jurisdiction under § 1252(a)(2)(D)." *Jarbough v. Att'y Gen. of U.S.*, 483 F.3d 184, 190 (3d Cir. 2007). We thus have no jurisdiction over Ms. Martinez-Rodriguez's first point.

B

In her second point, Ms. Martinez-Rodriguez argues that her due process rights were violated because the IJ failed to properly apply BIA precedent in denying her application.

"At the core of due process are the requirements of notice and a meaningful opportunity to be heard." *Jarbough*, 483 F.3d at 190. It is clear that Ms. Martinez-Rodriguez received both. She complains that the IJ and BIA failed to consider and discuss her argument comparing her factual situation with that in the three BIA precedential decisions that address the "exceptional and extremely unusual hardship" standard. This assertion misrepresents the record.

Our review shows that the IJ did discuss and consider all three decisions, recited the factual situation in each of those cases, and at places directly compared those factual situations with that in the present case. Further, the BIA's decision also cited the same three cases and, after examining a number of Ms. Martinez-Rodriguez's arguments on appeal, held that "the hardship faced by her family members [did not reach] the exceptional and extremely unusual level as outlined in th[e] Board's precedents." Admin. R., Vol. 1 at 19.

It therefore appears that Ms. Martinez-Rodriguez's actual complaint is that the BIA simply made the wrong decision regarding her application. We have held that a determination that an alien has not shown the "exceptional and extremely unusual hardship" necessary to qualify for cancellation of removal was an unreviewable discretionary decision because "[t]here is no algorithm for determining when a hardship is 'exceptional and extremely unusual.'" *Morales Ventura*, 348 F.3d at 1262. Further, Ms. Martinez-Rodriguez acknowledges in her opening brief that "[t]here are no hard and fast rules or definitions as to when the 'exceptional and extremely unusual hardship' standard is satisfied," and that "[e]ach case must be individually reviewed and assessed." Pet'r Opening Br. at 29.

Consequently, to the extent that Ms. Martinez-Rodriguez is arguing in her second point that the BIA violated her due process rights, we disagree. To the extent she is asking that we review the BIA's discretionary decision that she had not shown

"exceptional and extremely unusual hardship," we lack the jurisdiction to do so.

C

In her third point, Ms. Martinez-Rodriguez argues that the BIA failed to provide her due process and violated 8 C.F.R. §§ 1003.1(e)(5) and (6) by not assigning her appeal to a three-member panel for review. Under § 1003.1(e), the BIA may use one of three methods to decide appeals from IJ decisions. First, it may affirm the IJ's decision without opinion

> if the Board member [to whom the case is assigned] determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that
>
> A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or
>
> (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

8 C.F.R. § 1003.1(e)(4)(i).

Second, if the BIA member who is assigned the case decides that an affirmance without opinion is not appropriate,

> the Board member shall issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6) of this section under the standards of the case management plan. A single Board member may reverse the decision under review if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation.

Id. § 1003.1(e)(5).

Finally, a case may be assigned to review by a three-member panel only if the case presents one of a number of circumstances:

> (i) The need to settle inconsistencies among the rulings of different immigration judges;
>
> (ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;
>
> (iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;
>
> (iv) The need to resolve a case or controversy of major national import;

(v) The need to review a clearly erroneous factual determination by an immigration judge; or

(vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 1003.1(e)(5).

Id. § 1003.1(e)(6). As discussed above, the BIA member in this case issued a brief order under § 1003.1(e)(5) adopting the reasoning of and affirming the IJ's decision.

As to Ms. Martinez-Rodriguez's argument that the failure to provide review by a three-member panel denied her due process, we note that we held in *Tsegay v. Ashcroft*, 386 F.3d 1347, 1353 (10th Cir. 2004), that an alien has no constitutional right to appeal an IJ's decision to the BIA, and that the IJ's decision alone, affirmed without opinion by the BIA under § 1003.1(e)(4), provided the needed "reasoned agency decision on the merits of her petition for asylum." A fortiori, the BIA's short decision in this case, adopting the more detailed reasoning of the IJ's decision, provided the reasoned agency decision on the merits of her petition required by the Due Process Clause.

We therefore turn to Ms. Martinez-Rodriguez's argument that the BIA member violated § 1003.1(e)(6) in not forwarding her case to a three-member panel because (1) under § 1003.1(e)(6)(iii), the IJ's decision did not conform to BIA precedents; and (2) under § 1003.1(e)(6)(v), the IJ made clearly erroneous factual determinations. Ms. Martinez-

Rodriguez asks that we reverse the BIA member's procedural decision, and remand the case, directing that it be assigned to a three-member panel. We agree with the government that we do not have jurisdiction to review the BIA member's procedural decision.

In *Tsegay*, this court addressed the issue of whether we had jurisdiction to review the decision of a BIA judge to affirm an IJ's decision without opinion under § 1003.1(e)(4), rather than issue a written opinion. We did not have jurisdiction to review the IJ's underlying decision rejecting Tsegay's asylum application on the ground that the changed circumstances exception did not apply. *Tsegay*, 386 F.3d at 1354. In determining that we also did not have jurisdiction to review the BIA's decision to affirm without opinion, we examined the Immigration and Nationality Act (INA) and the Administrative Procedures Act (APA), the "[t]wo statutes defin[ing] our jurisdiction to review immigration decisions." *Id.* at 1353.

We first noted that we had no jurisdiction under the INA—which grants jurisdiction to review "final order[s] of removal," 8 U.S.C. § 1252(a)(1)—because "the BIA's procedural decision to affirm without opinion" was not a final order of removal; it was simply the procedural agency action that made the IJ's decision the final order of removal, and the IJ's decision was not reviewable. 386 F.3d at 1353.

In the present case, unlike the situation in *Tsegay*, the BIA judge issued a short opinion under § 1003.1(e)(5) instead of affirming without opinion,

and that short opinion became the final order of removal. But the actual decision that Ms. Martinez-Rodriguez is appealing from is the intermediate procedural decision not to forward the case to a three-judge panel, not the BIA member's final order, which in no way addressed his decision not to forward the matter to a three-judge panel. We note that under 8 U.S.C. § 1252(b)(9),

> [j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

But here, as we held above, the final order of removal is not reviewable.

In *Tsegay*, we next considered the APA's jurisdictional grant, noting: "[t]o be subject to review under the APA, the action at issue must be a 'final agency action.'" 386 F.3d at 1354 (quoting 5 U.S.C. § 704). We held that

> [t]he BIA's decision to affirm Tsegay's case without opinion was the final agency action here because it marked "the consummation of the agency decision-making process" and was an action "from which legal consequences flow," in that the affirmance without opinion establishes the IJ's asylum decision as the final order of removal.

Id. (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)). We went on, however, to find that there was still no jurisdiction because the BIA's decision was committed to agency discretion as a matter of law. *Id.* at 1355-58.

Here, the procedural decision that Ms. Martinez-Rodriguez is appealing was not the final agency action. The final agency action was the BIA member's short opinion affirming the IJ's decision, not his preceding procedural decision. Similar to the INA provision quoted above, [HN10] APA provides that "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704. But, again, we have no jurisdiction over the final agency action. Thus, under *Tsegay*, we have no jurisdiction to review that procedural decision not to assign the appeal to a three-judge panel.

This does not mean, however, that we never have jurisdiction to review a BIA member's decision not to forward a case to a three-judge panel. As correctly recognized by the parties, we held in *Batalova v. Ashcroft* that we did have jurisdiction to review the BIA judge's decision in that case. 355 F.3d 1246, 1253 (10th Cir. 2004). But in *Batalova* we had jurisdiction over the merits of the appeal and the petitioner was asking us to also review the decision not to forward to a three-judge panel. *See Tsegay*, 386 F.3d at 1358 (distinguishing *Batalova* on, among others, the ground that the court in *Batalova* had jurisdiction over the merits of the

underlying appeal). Thus, in *Batalova* the court noted that "it ma[de] little difference whether the BIA member properly or improperly determined to [affirm with a short order], or whether the BIA acted through a single member or a three-member panel, because we directly review the IJ's decision, which the BIA member adopted," and then went on simply to hold: "As our review of the merits of petitioners' case will reveal, we find no error in [the decision not to forward to a three-judge panel]." 355 F.3d at 1253 & n.8.

Here, the only issue on appeal to the BIA—whether Ms. Martinez-Rodriguez showed the requisite "exceptional and extremely unusual hardship" for cancellation of removal under § 1229b(b)(1)(D)—is an issue we do not have jurisdiction to review. And it would be impossible for us to determine whether this case presented either "[t]he need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents" or "[t]he need to review a clearly erroneous factual determination by an immigration judge," under § 1003.1(e)(6)(iii) and (v), as Ms. Martinez-Rodriguez requests, without engaging in the same merits determination we are without jurisdiction to conduct. *See Ngure v. Ashcroft*, 367 F.3d 975, 986 (8th Cir. 2004) ("[W]here a statute precludes judicial review of the IJ's determination, the court of appeals also lacks jurisdiction to review the BIA's decision to affirm without opinion, because such review would require the court to examine the merits of the IJ's unreviewable determination."); *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 853 (9th Cir. 2003) (same).

Thus, we have no jurisdiction to review the BIA member's procedural decision to decide the case with a short order under § 1003.1(e)(5) instead of forwarding it to a three-judge panel for review under § 1003.1(e)(6).

II

To the extent the second point of Ms. Martinez-Rodriguez's petition for review raises a proper due process challenge, it is DENIED. The remainder of her petition is DISMISSED for lack of jurisdiction.

Entered for the Court

Stephen H. Anderson

Circuit Judge

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Date: Mar 28 2008

File: A96 373 993 – Oklahoma City, OK

In re: SANDRA LETICIA MARTINEZ-RODRIGUEZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Robert Brown, Esquire

ON BEHALF OF DHS: Thomas Murphy
Assistant Chief Counsel

APPLICATION: Cancellation of removal

ORDER:

PER CURIAM. The respondent, a native and citizen of Mexico, has appealed the Immigration Judge's June 27, 2007, decision denying her application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The respondent argues that the

Immigration Judge erred in finding that the respondent's qualifying relatives would not suffer the requisite hardship if she was removed to Mexico.

We will dismiss the appeal as we agree with the Immigration Judge that the respondent does not qualify for cancellation of removal because she failed to show that her removal would result in exceptional and extremely unusual hardship for her qualifying relatives, namely her three United States citizen children and her lawful permanent resident father. For the reasons identified by the Immigration Judge, we agree that while the respondent's removal would adversely affect her family, the level of hardship falls short of the exceptional and extremely unusual standard set forth in section 240A(b) of the Act. *See Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *compare Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002).

We have considered the respondent's argument on appeal that her husband's status should not be ignored because he has been attempting over a long period to obtain lawful permanent resident status in the United States. However, the Board cannot consider him a qualifying relative for cancellation of removal purposes until he is accorded such status. We have also considered that the respondent and her husband gave conflicting answers on whether the respondent's husband and United States citizen children would join her in Mexico if she is forced to return (*See* Tr. At 82, 92). We do not consider the outcome of this inconsistency dispositive. We cannot find that the respondent satisfied the exceptional

and extremely unusual hardship standard for cancellation regardless of whether her qualifying relatives chose to return with her to Mexico. We cannot identify any particular factors that would cause the Board to conclude that their hardship would be exceptional and extremely unusual under either scenario. We therefore do not agree with the respondent's assertion that the hardship faced by her family members reaches the exceptional and extremely unusual level as outlined in this Board's precedents.

Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.[1]

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[1] The Immigration Judge granted the respondent more than 60 days to depart the United States voluntarily. Such was an improper exercise of discretion. *See Rivera v. Mukasey*, 508 F.3d 1271 (9th Cir. 2007) (holding that under the Illegal Immigration Reform and Immigrant Responsibility

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s John Guendelsberger
FOR THE BOARD

Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009, it is impermissible to grant voluntary departure for longer than 60 days. 8 U.S.C. § 1229c(b)(2). The Immigration Judge's grant of 90 days of voluntary departure to the alien was statutorily impermissible and the Board was required to correct the error).

APPENDIX C

U.S. Department of Justice
Executive Office for
Immigration Review

1100 Commerce Street,
Suite 404
Earle Cabel Federal Building
Dallas, Texas 75242

Date: June 27, 2007.

File: A96-373-993

Immigration Removal Proceedings in the Matter of: Sandra Martinez Rodriguez, Respondent.

Charge: **Section 212(a)(6)(A)(i), INA.**

Applications: **INA, Section 240A(b)(1) Cancellation of Removal**

INA, Section 240B Voluntary Departure

On Behalf of Respondent:

Robert Brown, Esquire, 1708 Broadway, Oklahoma City, Oklahoma 73119.

Oh Behalf of DHS:

Thomas R. Murphy, Assistant Chief Counsel, Office of the Chief Counsel, Dallas, Texas.

WRITTEN DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Procedural History.

The Respondent is a female, native and citizen of Mexico. She is not formally married, but lives with the father of her three children, all United States citizens as a result of their birth in this country. On January 28, 2004, the Department of Homeland Security charged the Respondent with being subject to removal from the United States. (Exhibit 1). The Respondent entered pleas as follows to the allegations and charge of removal against her.

Allegations: (1) The Respondent admitted that she was not a citizen or national of the United States; (2) The Respondent admitted that she was a native and citizen of Mexico; (3) The Respondent admitted that she entered the United States at or near an unknown place on "the southern border on or about sometime in 1988; (4) and the Respondent admitted that she was not then admitted or paroled after inspection by an Immigration Officer.

Charge of Removal: The Respondent conceded that she was subject to removal from the United States pursuant to Section 212(a)(6)(A)(i), INA, as amended, in that she was/is an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

Sustaining of the Charge of Removal: Based on the Respondent's pleas, this Court sustained the allegations and charge of removal against the Respondent.

Relief Sought: The Respondent provided that he would seek the relief of Cancellation of Removal for a Nonpermanent Resident.

II. STATEMENT OF THE LAW

Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents.

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien:

(A) has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under Section 212(a)(2), 237(a)(2), or 237(a)(3) (except in a case described in Section 237(a)(7) where the Attorney General exercises discretion to grant a waiver);

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

III. EXHIBITS

Exhibit 1: Notice to Appear, dated January 28, 2004.

Exhibit 2: Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents.

IV. TESTIMONIAL EVIDENCE

A. The Respondent testified, substantially, as follows:

Direct Examination

The Respondent stated that she was 12 years old when she came to the United States, and that she is 31 years old now. She said that her sister brought her here, seeking a better life.

She said that she went to school in Mexico, going as far as the 6th grade. The Respondent said that she did not go to school in the United States because

she did not want to go. She did not speak English and was timid and did not want to go to school.

The Respondent stated as a teenager she worked in a laundromat and also in a factory. She said that she did not work now because she wanted to be with her children.

She said that the only time she has been arrested was after a car wreck she was in.

The Respondent said that she has gone to churches and hospitals for free English courses. She said that she speaks English with her children, and Spanish with her husband.

She said that she had three daughters. Her oldest daughter, Jazmine, is 11. Her oldest child speaks some Spanish, but can not read or write Spanish. Her next oldest daughter is Jeannette, age 7. She said that Jeannette speaks English and can not read or write Spanish. Jeannette does always speak correctly in Spanish. The Respondent's youngest daughter is America, who is 4.

The Respondent said that America has had some health problems in the past. On three occasions America has had high body temperature, and her body will turn blue. America was taken to the hospital for this, and the doctor gave her tylenol. It has been over a year since America has an attack.

She said that America speaks both Spanish and English. The Respondent said that she had always lived with her children's father. She said that her husband's sister pays rent for their house. She

doesn't own her home. She said that her husband, Martin, owns two vehicles, a 92 Lexus, and a 9S Suburban.

The Respondent said that she only drives when she has to pick up the kids from school.

She said that she was in good health, although at times she was a little bit nervous.

She further stated that she would be crying if she had to go back to Mexico.

She said that her mother had a home in Torrejon, Mexico. The home had 2 bedrooms, a dining room, a veranda, and porch.

The Respondent said that she could not work in Torrejon, but she did not know why she could not work there.

She said that her children did not want to live in Mexico. She said that her children could not go to school in Mexico because they did not speak Spanish. The Respondent said that in her neighborhood her children were made fun of by Spanish speaking children, because her children's Spanish was not as good.

The Respondent said that her father was an LPR, and that he had high blood pressure, and had experienced memory loss.

The Respondent said that she sent her mother in Mexico about $50.00 a month.

She said that her husband keeps the bank accounts, and that she did not know how much he had in the bank.

The Respondent stated that if she was deported to Mexico, that her daughter, Jazmine. would not go to school because she was shy. She said that Jeannette and America would go to school in Mexico.

She said that her daughters have close family ties in this country. They are close to their father.

Cross-Examination

The Respondent said that she did not have a drivers license. She drives only when necessary. She drives a car once a week. The car is insured.

She said that her children were healthy.

The Respondent said that her husband would go to Mexico if she was deported. She said that her whole family would go.

The Respondent said that her husband would work as a mechanic in Mexico. She said that she only went to the 6th grade.

The Respondent said that all of her three children had received medicaid. They had not received food stamps.

Immigration Judge Examination

The Respondent said that her husband had two brothers in Mexico, and one sister who lived in Torrejon, Mexico, where her mother lived.

B. The Respondent's husband, Martin Aguilar Martinez, testified, substantially, as follows:

Direct Examination

The Respondent's husband stated that he had been with the Respondent for 12 years. He came when he was 12, and was now 37, and been in the United States for 25 years.

He said that he learned English after coming here. He said that he lived with his father and uncle when he came here. He said that his father lives with him and his family.

The Respondent's husband does not have legal status in the United States. Nor does his father.

The Respondent's husband said that he made about $700.00 a week, and that he gave his wife about $600.00 of that. He said that he had about $11,000 in various bank accounts. He also stated that he owns his two vehicles.

The Respondent's husband said that if the Respondent was deported that he did not think he would go, but rather would stay here with the children. It would be easier to support his family that way.

The Respondent's husband said that Jazmine did not speak Spanish well, Jeannette does better than Jazmine, and America is too young to speak either very well.

He said that he had 3 sisters and one brother in Mexico. In the United States he has one sibling who is legal, and one here who is not legal.

The Respondent's husband said that he would not go back to Mexico, it is better in the United States.

Cross-Examination

The Respondent's husband that his wife would not leave. He did not want her to go. Then he said that he would have to speak with her first about whether she would leave or not.

He said that at the supper table both languages are spoken.

C. Jazmine, the Respondent's oldest daughter, age 11, testified substantially as follows:

Direct Examination

Jazmine stated that she spoke English best, but also spoke Spanish, but had trouble with enunciation at times, and also the right words at times.

She said that she had made a couple of trips to Mexico to visit her relatives. She said that she

understands Spanish, and tries to read Spanish, but does not write Spanish.

She talks to her sisters in English. She speaks one half English and one half Spanish to her mother. It is the same with her father.

D. The Respondent's father, Tomas Martinez, testified substantially as follows:

Direct Examination

He said that he was 75 years old. He is an LPR and is retired. He said that he had attacks from dust. He said that if the Respondent was removed, that he could drive to Mexico to see her.

Cross Examination

The Respondent's father said that he did not petition for his daughter, because he did not think it was important.

V. LEGAL AND FACTUAL ANALYSIS

Congress created the relief of cancellation of removal under section 240A(b)(1) of Act as part ofthe Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Public Law No.1 04-208, 110 Stat. 3009-546. In order for an alien to qualify for cancellation of removal, the alien must establish that:

(A) he has been physically present in the United States for a continuous period of not less

than ten (10) years immediately preceding the date of his application;

(B) he has been a person of good moral character during such period;

(C) he has not been convicted ofan offense under section 212(a)(2), 237(a)(2), or 237(a)(3) of the Act; and,

(D) his removal would result in an exceptional and extremely unusal hardship to his spouse, child, or parent, who is a citizen of the United States or a lawful permanent resident. *See* INA, Section 240A(b)(I).

A. Ten Years Continuous Physical Presence in the United States.

Under section 240A(b)(I)(A) of the Act, the respondent must show that he has been physically and continuously present in the United States for ten years preceding the date of his application for cancellation of removal. The ten year period of continuous physical presence ends "when the alien is served a notice to appear." *See* INA, section 240A(d)(1). Moreover, the respondent must not have departed the United States for any period in excess of 90 days or for any periods that in the aggregate exceeds 180 days. *See* INA, section 240A(d)(2).

Courts Finding: The Record supports that the Respondent has met the ten years of continuous physical presence in this country.

B. Good Moral Character.

Under section 240A(b)(1)(B), in order to be eligible for cancellation of removal, the respondent must also show that he has been a person of "good moral character" for not less than 10 years immediately preceding the date of his application.

Good moral character is a term of art defined under section 101(f) of the Act and includes seven enumerated actions or behaviors that disqualify an individual from qualifying for cancellation of removal, specifically providing that no person shall be found to have good moral character if it is established that the person: (1) is a habitual drunkard, (2) is inadmissible under various sections of 212(a) of the Act, (3) derives income principally from gambling, (4) has been convicted of two or more gambling offenses, (5) has given false testimony in order to obtain any benefits under the Act, (6) has been incarcerated for an aggregate period of more than six months, or, has been convicted of an aggravated felony. Further, section 101(f) allows the Court in its discretion to find a person to lack good moral character.

Courts Finding: The Record supports that the Respondent has the requisite good moral character.

C. Criminal Convictions.

Another requirement that must be met in order to establish the respondent's eligibility for cancellation of removal is that he cannot have been convicted of an offense under section 212(a)(2),

237(a)(2), or 237(a)(3) of the Act. *See* INA, section 240A(b)(1)(C).

Courts Finding: The Record does not establish that the Respondent has a disqualifying conviction.

D. Exceptional and Extremely Unusual Hardship.

As a final requirement to establishing eligibility for cancellation of removal, the respondent must show that his removal from the United States would result in an "exceptional and extremely unusual hardship" to his qualifying relatives. *See* INA, section 240A(b)(1)(D). In the instant matter, the respondent's **qualifying relatives are her LPR father, and three USC children**.

The Board of Immigration Appeals ("Board") has interpreted the "exceptional and extremely unusual hardship" requirement in three recent cases. In the first case, *Matter of Monreal*, the respondent was a 34-year old male, native and citizen of Mexico who was married with three U.S. citizen children. *Matter of Monreal*, 23 I&N Dec. 56, 57 (BIA 2001). One of the respondent's children was an infant and the other two were ages 12 and eight. The children were in good health and the oldest child could fluently read, write, and speak both Spanish and English. *Id.* at 64. The respondent's wife, who was not eligible for cancellation of removal, voluntarily departed to Mexico shortly before the respondent's hearing on his application, and she took their infant child with her. The respondent's parents and seven of his eight siblings lawfully resided in the United States, with one sibling living in Mexico. *Id.* at 57. The

respondent had been "gainfully employed" since his arrival to the United States. *Id.*

The Board in *Monreal* stated that in order to meet the "exceptional and extremely unusual hardship" test for cancellation of removal, an applicant "must demonstrate that his or her spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the alien's deportation, but need not show that such hardship would be 'unconscionable.' " *Id.* at 56. In establishing eligibility, the Board further stated that "only hardship to the qualifying relatives, not to the applicant, himself or herself, may be considered." *Id.* The Board listed several factors to be weighed, namely the ages, health, and circumstances of the qualifying relatives, including "a child with very serious health issues, or compelling needs in school." *Id.* at 63. Moreover, "[a] lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative." *Id.* Finally, the Board stated that "all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship." *Id.* at 64.

In applying this standard, the Board held that the respondent in Matter of *Monreal* did not qualify for cancellation of removal. The Board stated that both the children and the respondent were in good health, and there was no evidence showing that the respondent would be unable to work and support his United States citizen children in Mexico. In fact, the

respondent had a brother in Mexico who had worked in the same business as the respondent had for the past ten years in the United States. The Board also found that because the respondent's wife was already in Mexico with one of his children, the family would actually be reunited. *Id.* at 64.

Furthermore, the Board stated that since the respondent's oldest child was fluent in Spanish, he would not suffer hardship in adjusting to life in Mexico. For these reasons, the Board held that even when considering all of these factors cumulatively, the respondent had not met his burden of establishing that his children or parents would suffer exceptional and extremely unusual hardship if he were removed. *Id.* at 65.

In the second case, *Matter of Andazola*, the Board further interpreted the meaning of the "exceptional and extremely unusual hardship." The facts of that case presented the respondent as a 30-year old woman who was a native and citizen of Mexico with two children, ages 11 and six. The respondent stated that she was a single mother, although she lived with her significant other who was also the father of her children. *Matter of Andazola*, 23 I&N Dec. 319, 320 (BIA 2002). The respondent was employed, owned a house valued at $69,000, two vehicles valued at $12,000, and had $7,000 in savings. All of the respondent's siblings resided illegally in the United States and she had no children who could help her with her children. *Id.* The respondent stated that, if removed to Mexico, she was worried that she would be unable to find a job comparable to the job she had in the United

States. She was also worried that her children would not be able to get "much education in Mexico, especially when they get older and reach the point where she would have to pay for it." *Id.* The oldest child did not speak "academic Spanish" and therefore might be placed in a lower grade in Mexico.

The Board in *Matter of Andazola* held that the respondent was not eligible for cancellation of removal because she did not meet the "exceptional and extremely unusual hardship" standard. The Board found that although the respondent's children may be deprived of the education available to them in the United States if they were relocated to Mexico, they would not be deprived of all schooling and would likely receive up to a ninth grade education in Mexico. *Id.* at 323. Furthermore, while the respondent did not have any family in Mexico, the Board held that it would not "consider the fact that the respondent's family is here illegally, rather than in Mexico, as a factor that weighs in her favor." *Id.* Moreover, the Board found that the respondent was not a single mother because her significant other lived with her, provided financial support to their family, and could continue to help support the family while they were in Mexico. The Board also found that because the respondent had meaningful equity in her house, cars, $7,000 in savings, and a retirement fund, she would be able to establish a "new life in Mexico." *Id.* at 324. Finally, the Board held that because "the fact pattern presented [is] a common one, and the hardships the respondent has outlined are simply not substantially different from those would normally be expected upon removal to a less developed country," *Id.* at 324, the respondent

had not met the "exceptional and extremely unusual hardship" standard and was therefore ordered removed to Mexico.

In the third case, *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002), the Respondent, a single mother who had no immediate family remaining in Mexico, provided the sole support for her six children, and had limited financial resources, established eligibility for cancellation of removal under Section 240A(b) of the Immigration and Nationality Act, 8 U.S.C., Section 1229b(b) (2002), because she demonstrated that her United States citizen children, who were 12, 11, 8, and 5 years old, would suffer exceptional and extremely unusual hardship upon her removal to her native country.

The factors included in assessing the hardship to the Respondent's children included the heavy burden imposed on the Respondent to provide the sole financial and familial support for her six children if was deported to Mexico, the lack of any family in her native country, the children's unfamiliarity with the Spanish language, and the unavailability of an alternative means of immigrating to this country.

In sum, the Board has established the following criteria for determining an individual's eligibility for cancellation of removal based on the "exceptional and extremely unusual hardship" standard. The individual must demonstrate that her qualifying relatives would suffer hardship that is "substantially beyond that which would ordinarily be expected to result from the alien's deportation, but need not show that such hardship would be 'unconscionable.'"

Matter of Monreal, 23 I&N Dec. 56, 57 (BIA 2001). Factors that may be taken into consideration by the Court include the ages, health, and surrounding circumstances of the qualifying relatives. Such surrounding circumstances include: (a) any compelling needs which the qualifying relatives may have in school in the United States; (b) the level of education available to the qualifying relatives in the country of return; (c) the amount of support (financial, emotional, psychological, or otherwise) available to qualifying relatives in the United States and in the country of return; (d) the respondent's available equity in the United States; (e) the adverse conditions or lower standard of living of the country of return in so far as they affect the qualifying relatives; and, (f) any other circumstances related to the respondent insofar as they affect the qualifying relatives. Furthermore, these hardship factors must be considered in the aggregate so that no single factor need determinatively establish that the qualifying relatives will suffer exceptional and extremely unusual hardship

The Court will now address the relevant hardship factors in this case.

The Respondent's qualifying relatives are her three USC children and her LPR father. The evidence reflects that the general health of the Respondent's children is good. While the Respondent's youngest daughter, America, has had past difficulty with high temperature, no evidence was presented that the condition had been recent, nor was any evidence presented that the condition was very serious. In fact, the evidence provided that

although America had been taken to the hospital, that the attending doctor simply provided her tylenol and recommended cold raps. Further, the evidence provided that the medical opinion was that if America made it to 5 years of age, that the condition would not be a serious threat to her health. America is now 4 years, and it has been over one year since her last episode. In regard to the Respondent's father, he is 75 and retired. He has had difficulty with attacks from dust, and suffers from memory loss. However, no serious medical prognosis was provided in regard to the Respondent's father, and by his own testimony he would be able to drive to see his daughter if she was removed from the United States. In sum, no serious health condition was provided in regard to the Respondent's three USC children.

The Respondent placed considerable concern on her children's ability to attend school in Mexico due to their inability to speak, read, and write Spanish well. Another concern was that she would not be able to pay for her children's school in Mexico. A review of the Record reflects that the Respondent's oldest daughter, Jazmine, age 11, speaks English best, but does speak Spanish, albeit with imperfect enunciation, and at times difficulties with words. In her testimony, Jazmine provided that she did speak Spanish, in fact, she spoke to both her mother and father in Spanish and English. Jazmine further provided that she understands Spanish, tries to read Spanish, but does not write Spanish. The Respondent stated that her middle daughter, Jeannette, age 7, does not always speak Spanish correctly, and that she did not read or write Spanish.

The Respondent said that America, the youngest, speaks both English and Spanish, but is limited in each as she is only 4 years old. Notably, the Record provides that all of the children have returned to Mexico and visited with their relatives. Based on the Record, seemingly the Respondent's children, who are relatively young, all have a foundational base in the Spanish language. After all it is their parent's 'best' language, and they would be able, in time, to more fully adapt to the language of Mexico, especially in the case of Jeannette and America. Further, as noted in *Andazola,* although a respondent's children may be deprived of the education available to them in the United States if they were relocated to Mexico, they would not be deprived of all schooling and would likely receive up to a ninth grade education in Mexico. Notably, in *Andazola*, two of the Respondent's four children, ages 11 and 6, had difficulty speaking Spanish and did not read or write Spanish.

The Respondent has strong family ties in both Mexico and the United States. Notably, the Respondent's mother lives in Torrejon, living in her own home. The Respondent also has four siblings living in Mexico. The Respondent has three siblings living in the United States lawfully (Oklahoma City), and another sibling living in the United States "illegally". Further, the Respondent's husband and father of her children also has four siblings living in Mexico, including one sibling in Torrejon, where the Respondent's mother lives. The Respondent's husband also has one sibling in the United States legally, and one here who is illegal. The father of the Respondent's children is without legal status in the

United States. In this instance, the Respondent and her qualifying relatives have very strong family ties in Mexico.

The Respondent and her husband have assets, including two cars and $11,000 in various accounts. This is far less than the Respondent in *Andazola*, but more than the Respondent in *Recinas*. What is notable is that the Respondent is young and healthy, and has work experience in both a laundromat and factory. Seemingly, she could find work in Mexico, even though she stated she did not think that she could, further stating that she did not know why she couldn't. Additionally, the father of the Respondent's children, who is a mechanic making $700 a week, would be of assistance. Further, as her husband is also without status, should he be deported, then, seemingly, he would be able to find work in Mexico as a mechanic, and the family would be reunited. In sum, the Respondent has some assets available to her, a working husband, and she, herself, has prior work experience that could once again be utilized. As noted in *Monreal*, a lower standard of living or adverse country conditions in the country of return are factors to consider as they may affect a qualifying relative, but generally will be insufficient in themselves to support a finding of exceptional and extremely unusual hardship.

Clearly, this Respondent has been in this country for a long period of time, and there does not appear to be a readily available means of immigrating back to this country. Clearly she and her family will suffer hardship if the Respondent is removed. It is hard to imagine a case in which some

degree of hardship is not realized. However, this relief is one that requires more than just hardship, but exceptional and extremely unusual hardship. It is this Court's finding that the Respondent has not established the requisite level of hardship for her qualifying relatives. There are no serious health issues present, nor are the compelling school needs. The Respondent is young, and has prior work experience, seemingly work experience that would transferable to the Mexican economy. Further, she and the father of her children have some assets, with $11,000 being in cash. Many in Mexico could only dream of such an amount. Notably, the father of her children could work in Mexico as mechanic, and may well have to unless he achieves status in this country. The Respondent's children are young, and have a foundation in the Spanish language. After all they have to, as Spanish is each parent's best language. Additionally, the Respondent and her family have significant family ties in Mexico.

Aggregate Effects of Hardships.

Individually and cumulatively, the above factors compel the Court to find that the "exceptional and extremely unusual hardship" standard has not been met, because the respondent's qualifying relatives would not suffer hardship that is "substantially beyond that which would ordinarily be expected to result from the respondent's deportation." *Matter of Monreal*, 23 I&N Dec. at 56.

VI. CONCLUSION

For these reasons, this Court finds that the respondent is not eligible for cancellation of removal.

VII. VOLUNTARY DEPARTURE

The Court may grant the discretionary relief of voluntary departure at the conclusion of a proceeding under section 240B of the Act if it finds the following: (1) the alien has been physically present in the United States for at least one year immediately preceding the date on which the Notice to Appear was served; (2) the alien has been a person of good moral character for at least five years preceding his application for voluntary departure; (3) the alien is not deportable under sections 237(a)(2)(A)(iii) or 237(a)(4) of the Act; and, (4) the alien has established by clear and convincing evidence that he has the means to depart the United States and intends to do so. *See* INA, section 240B(b)(1).

The respondent in this matter qualifies for voluntary departure because he has established the above requirements to the satisfaction of the Court. The respondent's request for voluntary departure will be approved in the exercise of the Court's discretion. Even so, this Court must note that the Respondent's husband first provided that the Respondent would not return to Mexico, as he did not want that. He later reconsidered his position, providing that he would talk to her about it. The Respondent stated that she would return voluntarily if provided the opportunity.

VIII. ORDERS

IT IS ORDERED that the respondent's Application for Cancellation of Removal and for Adjustment of Status for Certain Nonpermanent Residents under INA section 240(b)(1) be and is **DENIED**.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure under INA section 240B be and is **GRANTED**.

The respondent is granted voluntary departure without expense to the government on or before October 25, 2007, or an extension beyond such date as may be granted by the District Director of the Department of Homeland Security, and under such conditions as the District Director may direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the respondent shall be removed from the United States to Mexico on the charge contained in the Notice to Appear.

IT IS FURTHER ORDERED that the respondent shall post a voluntary departure bond in the minimum amount of **$500.00** with the Department of Homeland Security within five business days of issuance (mailing) of this order.

Warning to the Respondent: Failure to depart as required means that you could be removed. You may have to pay a civil penalty of US $1,000 to US $5,000

and you would become ineligible for voluntary departure, cancellation of removal, and any change or adjustment of status for ten years. If you fail to depart as required and then fail to comply with the removal order, you could also be fined US $500 for each day of non-compliance.

Appeal: This decision is final unless an appeal is filed with the Board of Immigration Appeals within 30 calendar days of the date of the mailing of this written decision.

Date: June 27, 2007.

/s Richard Randall Ozmun
Richard Randall Ozmun
Immigration Judge
U.S. DOJ/EOIR

Copy to:
Chief Counsel, BICE